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REVEREND PAUL SCHENCK AND
DWIGHT SAUNDERS,

Petitioners,

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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The injunctive restrictions at issue directly restrict speech in traditional public fora. The "fixed buffer zones" prohibit all "demonstrating" within fifteen feet of the entrances and driveways of abortion facilities. Pet. App. A-183. The "floating bubble zones" prohibit all "demonstrating" within fifteen feet of any person or vehicle coming to or going from abortion facilities. *Id.* The "cease and desist" provision enables "anyone or any group of persons" to veto speech in a public forum by "verbally or nonverbally" indicating a desire not to be counseled. Pet. App. A-29, A-184.

Respondents and their amici downplay the extreme nature of the speech-restrictive injunctive provisions at issue. Resp. Br. at 30; Brief of United States at 26 n.15; Brief of American Civil Liberties Union *et al.* (ACLU Br.). Yet the challenged provisions represent some of the most outrageous restraints on free speech ever to come before this Court.

FLOATING BUBBLE ZONES AND FIXED BUFFER ZONES

The "floating bubble zones" prohibit "demonstrating" within 15 feet of anyone coming to or going from any abortion facility. Petitioners and other defendants dare not "demonstrate" on any sidewalk less than 15 feet wide because passing pedestrian traffic will put "demonstrators" in contempt of court. Indeed, petitioners cannot "demonstrate" on *any* sidewalk, no matter how wide, because there is no reason to believe abortion staff, patients, and escorts will voluntarily leave a 15-foot berth when walking by. In effect, these invisible, floating, anti-speech zones flatly ban praying, preaching, singing hymns, picketing, leafletting, and anything else deemed to be "demonstrating." Even the district court that created these zones considered the concept of floating bubble zones unworkable and unfair. Dkt. 13, p. 36 (Tr. of 9/27/90) (App. A to this reply brief). Said the court:

> my gosh, you would never be able to ever realistically know how to deal with that, if it was a moving length . . . . I think you have to apply common sense to this too, and that would

not in any way at all be a fair interpretation [of the TRO].

Id.[1] Unfortunately, the district court's preliminary injunction imposed precisely this unrealistic and unfair restriction.

There is also no geographic limit to these floating bubbles. Respondents in effect concede the need for such limits. Resp. Br. at 42. The ACLU concedes that the absence of geographical boundaries renders the floating zones unconstitutionally vague. ACLU Br. at 23 n.20.

Both the fixed buffer zones and the floating bubble zones prohibit "demonstration," and only "demonstration," within the zones. Hence, these injunctive restrictions directly target *expression*, not conduct. Other provisions of the injunction already forbid trespassing, blocking, obstructing, physically abusing, grabbing, touching, pushing, shoving, and crowding. Pet. App. A-183 to A-184. These zones therefore ban only peaceful speech, indeed "the entire universe of expressive activity," Pet. App. at A-52 (Meskill, J., dissenting), including "such sacrosanct First Amendment conduct as holding a placard containing an antiabortion message, passive leafletting or handbilling, silent picketing and even the mere voicing of protest," *id.* at A-54. Furthermore, the 15-foot speech-free zones reflect no site-based tailoring, but instead impose a one-size-fits-all restriction on "demonstration". The validation of this injunction would be the universal validation of 15-foot zones.

The fixed buffer zone is unconstitutionally vague as applied to abortion facilities in multi-tenant buildings or with shared doorways, driveways, and parking lots, where it is unclear what the "doorway entrance" or driveway of the abortion facility is.

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1. It appears that the district court was badly confused about the terms of its own TRO. *Compare id. with* JA 23, ¶ 1(a).

E.g., Tr.[2] 207, 210 (unclear whether "entrance" applies to abortion facility on fifth floor or front door of office tower); Tr. 419-20 (escorts themselves do not know where buffer zone applies).

CEASE AND DESIST PROVISION

The cease and desist provision suffers from a fundamental flaw: it subjects peaceful speech in a public forum to a consent requirement. Pet. Br. § V(B), (C). This Court struck down an indistinguishable provision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). Pet. Br. § V(A).

Respondents claim that this provision "protects only *unwilling* listeners from forced proximity to the unwanted messenger and from being stalked at very close range." Resp. Br. at 42 (emphasis in original). This argument founders, as a matter of *law*, on *Madsen*, 114 S. Ct. at 2529. Respondents are also wrong, as a matter of *fact*, in at least two obvious respects. For one thing, this provision permits the pregnant woman's companion[3] (who may be pressuring her to abort[4]) to veto the sidewalk counseling and thus cut off communication with a

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2. "Tr." refers to the consecutively paginated transcripts of the preliminary injunction hearings held from March 6, 1991 through April 1, 1991.

3. The injunction empowers "anyone *or any group of persons*" to invoke the "cease and desist" requirement. Both respondents' counsel, dkt. 65, p. 1322 (Tr. of 2/14/91) ("a companion saying no" suffices) and the district court, JA 133 (relying in part on male companion's verbal objection to counseling) interpret this provision to allow the pregnant woman's companion to veto efforts to reach her. The Second Circuit evaded the question. Pet. App. at A-30 n.5. Respondents' partial concession at oral argument in the Second Circuit, cited by that court, *id.*, did not specifically address the situation of a companion cutting off sidewalk counseling to a woman.

4. Many patients (one witness estimated ten percent) are pressured to abort, against their will, by parents, boyfriends, and so forth. Tr. 630-31, 697.

possibly willing recipient.[5] *See also* Tr. 1284-86 (App. B to this reply brief). For another, the cease and desist provision does not prohibit proximity or stalking; it only prohibits *communication* within a certain distance. Thus, a person who does not "demonstrate" or sidewalk counsel could "stalk" as closely as he wished without running afoul of the "cease and desist" provision or, for that matter, the bubble and buffer zones.

This provision also suffers from gross vagueness. A verbal or nonverbal "indication" of a desire not to be counseled triggers the cease and desist requirements. Pet. App. at A-29 (as modified by Second Circuit). The ACLU concedes that the "nonverbal indication" language is unconstitutionally vague. ACLU Br. at 25 n.21. Respondents claim that there are commonly understood ways of verbally indicating a desire not to be counseled. Resp. Br. at 46. This is true but irrelevant. For every clear verbal statement, there are countless ambiguous utterances and vague nonverbal signs.[6] Respondents' invocation of a "reasonableness" test and a heightened standard of proof, *id.* at 47, merely transfers the second-guessing to a finder of fact in the subsequent contempt trial of the hapless sidewalk counselor.

BUFFERS AND BUBBLES FOR VEHICLES

Respondents defend the 15-foot zones as applied to cars by urging that 15 feet is the length of the average car and therefore corresponds to "a safe turning radius and amount of visual space a driver needs while turning." Resp. Br. at 37. This argument offers no more than a colorable basis for an apparently arbitrary

5. The reverse can also occur: the woman says no, but the companion is willing to hear out the sidewalk counselor. *E.g.*, Tr. 1588-89.

6. It can also be unclear whether a woman "indicating" a desire to be left alone is addressing the sidewalk counselors or the pro-abortion escorts. *E.g.*, Tr. 1547-48.

distance. More than that is necessary to justify abridgement of free speech in public fora. The "turning radius" argument, for example, makes no sense as applied to portions of the sidewalk which are adjacent to, but do not cross, the driveway – cars do not drive or turn there. The "visual space" argument does not apply to pedestrians who neither stand in the path of a car nor block the side view of a car pulling *onto* a street.

In the past, drivers have willingly stopped, and they and their passengers have received the communications of sidewalk counselors. Tr. 146, 225-26, 354-55. Such peaceful exchanges impede neither the turning nor the vision of the driver. Respondents' proposed justifications simply do not fit the ban in question.

REPLY TO RESPONDENTS' STATEMENT OF FACTS

Respondents expend twenty pages on their statement of the case. It is mathematically impossible, in the twenty pages allowed for this reply brief, to point out all of the inaccuracies, exaggerations, half-truths, and distortions contained in respondents' lengthy recitation. Petitioners wish, however, to make certain observations regarding the facts in this case.

1. Respondents have seriously failed in their obligation to present the record accurately.[7] In a First Amendment case, this Court has an independent obligation to review the entire record. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338, 2344 (1995). This duty applies with full force here. Petitioners cannot emphasize enough that

7. Respondents accuse petitioners of being "utterly disingenuous," Resp. Br. at 7, because petitioners supposedly denied that there were any blockades at abortion facilities. But the documents respondents cite – Pet. at 5; Pet. Br. at 14, 30 – refer to the absence of any blockades *after the TRO* (and prior to the preliminary injunction). *See* Pet. at 5-6 (quoting district court's finding of this very fact).

respondents' factual representations simply are *not* reliable. Each assertion of respondents must be compared against the record.

a. Respondents assert that the record here is "evocative" of the record in *Madsen*. Resp. Br. at 23. But the district court found that, after issuance of the TRO, *no defendants physically blocked patient access.* Pet. App. A-146 & n.5. The district court also found that defendants' "demonstrations are usually peaceful in nature," Pet. App. A-144. Twelve of the fifteen judges sitting *in banc* in the Second Circuit explicitly recognized that "the record in *Madsen* revealed a considerably greater history of disruption than does the record in the instant matter." Pet. App. A-144 (Winter, J., concurring, writing for ten judges). *Accord* Pet. App. A-50 to A-51 (Meskill, J., dissenting, writing for two judges). *See also* Pet. App. A-8 (lead opinion of Oakes, J.) (reciting district court finding that the "demonstrations are mostly peaceful in nature").

b. Respondents distort the record of supposed misconduct by picketers. Some of the most blatant examples follow.

Respondents state that Susan Ward, an employee of respondent Buffalo GYN Womenservices, "testified that even after the TRO, she was blocked every day when she came to work." Resp. Br. at 9 (citing Tr. 620-21). What Ms. Ward actually said was that "on Wednesdays and Fridays" she was delayed "[m]omentarily" while waiting for people carrying signs on the sidewalk which crosses the driveway to move out of the way. Tr. 620-21. Respondents quote Ms. Ward as recounting an incident when she "could not get into the driveway at all," Resp. Br. at 9 (quoting Tr. 621), representing that this occurred "despite the TRO's prohibition on blocking," Resp. Br. at 9. But in fact Ms. Ward testified that this incident occurred "when they [i.e., the picketers] were allowed to do more of the blockading," Tr. 621, which clearly refers to the time *prior* to the TRO, and

therefore cannot be "despite the TRO."

Particularly egregious is respondents' description of the activity for which defendants Bonnie Behn and Carla Rainero were held in civil contempt. Respondents characterize the incident as Behn and Rainero "harassing and stalking a patient the length of a city block and terrorizing her with a videocamera," Resp. Br. at 5 (citing JA 102-20). In fact, as the district court found, Behn and Rainero simply walked along with the woman, verbally counseled her, and offered her literature. JA 106-09. The undisputed evidence showed that neither Behn nor Rainero shouted, assaulted, grabbed, touched, blocked, or did anything other than communicate peacefully. The court did not even find that Behn or Rainero approached too close to the woman. Rather, the district court held Behn and Rainero in contempt because the court found that they "ignored the young woman's manifested desire to be left alone and continued to counsel her," in violation of the "cease and desist" provision. JA 117. For this, Behn and Rainero were fined $10,000 each, JA 119, and held jointly liable for $25,260.16 in attorney fees, dkt. 427 (Order of 3/15/94).

Respondents assert that a "demonstrator" caused a pro-abortion escort to "fall under a car," Resp. Br. at 9 (citing Tr. 343-44), and that "some of the [picketers'] helpless babies were nearly run over" by cars, Resp. Br. at 10 (citing Tr. 344-45). The cited portions of the record simply do not substantiate these inflammatory allegations.

Respondents accuse defendants of "trespassing" into the building housing the respondent Erie Medical Center, Resp. Br. at 10, but the first floor lobby where this supposed "trespassing" took place contains a restaurant and a drugstore and is open to the public, Tr. 237-38.

Respondents assert that defendants, "despite the TRO, invaded the clinic's waiting room on the fifth floor." Resp. Br. at 10. The actual testimony was that on one occasion an unidentified young man was "wandering around the waiting room, with no apparent reason," Tr. 352. His only alleged connection to the defendants was that, after he left the building, he "was seen speaking to the anti-abortion people outside," *id.*

Respondents describe incidents of vandalism. Resp. Br. at 10. But these involved either pre-TRO blockades or the acts of unknown perpetrators.

Respondents quote testimony about people allegedly lying or kneeling in the driveway to block cars, asserting that this testimony applied to post-TRO activities. Resp. Br. at 11. But the transcript in question shows that the witness was testifying about pre-TRO activities in 1989. Tr. 185-86. (The TRO issued in September, 1990.)

Respondents claim that petitioner Rev. Paul Schenck "pinned patient escort Warnes up against the door." Resp. Br. at 12. Respondents' *counsel* tried to characterize the situation this way, but this was not what witness Warnes said, Tr. 183-85.

Respondents accuse sidewalk counselors of "shouting directly into patients' faces." Resp. Br. at 12. In fact, the testimony shows that when picketers or sidewalk counselors shouted, it was because their audience was some 30 feet or more away down a driveway, Tr. 65-66, 124, 127-28, or on the other side of a glass barrier, *e.g.*, Tr. 175-76, 248-49 (lobby doors at Womenservices). Respondents assert that "[w]itnesses also described . . . actual . . . fist-fights," Resp. Br. at 14 (citing Tr. 180), but the cited testimony mentions no such incidents.

Respondents claim that "the invasive behavior of the anti-abortion protestors [sic] . . . sends some asthmatic patients into respiratory arrest." Resp. Br. at 15. The actual testimony was that one patient with asthma was "upset" and "was not able to

breathe normally," Tr. 508.

c. Respondents completely ignore the role of the pro-abortion "escorts" of the respondent Pro-Choice Network of Western New York. The *raison d'etre* of these escorts is to counter pro-life sidewalk counseling. Tr. 99, 217-18, 380. Escorts immediately approach anyone whom pro-life individuals try to counsel. Tr. 128. The escorts try to get closer to that person than the sidewalk counselors, surround that person, and talk continuously about anything and everything in order to nullify the counselors' efforts to communicate. Tr. 130-31, 174, 215-16, 271, 291, 395-96. Escorts urge people not to listen to pro-life counselors and tell vehicles to move on past the counselors, even when the occupants have willingly stopped and are listening to sidewalk counselors. Tr. 226. *See, e.g.*, Tr. 1289-90 (App. B to this reply brief). Escorts have used whistles, kazoos, chanting, shouting, singing, and loud music to drown out pro-life speech. Tr. 117-18, 127, 226-27, 385-86, 1644-46. Escorts have physically blocked pro-lifers with their bodies or with signs or building materials in an effort to disrupt their counseling. Tr. 126, 387-89, 1646-47. At least one escort used a squirt gun against pro-life counselors. Tr. 141, 1649. Others have tried physically "to take the driveway" away from pro-life pedestrians, Tr. 143, and have linked arms in a human blockade of their own, Tr. 192-93. One of respondents' attorneys blocked and battered a sidewalk counselor. Dkt. 139, pp. 1490-92 (Tr. of 10/30/91).

It is precisely the escorts' physical interference and disruptive noise-making which make the communication of the sidewalk counselors' message an arduous task. *See also* Pet. App. A-148 n.6; Tr. 1287-90 (App. B to this reply brief).

2. Respondents portray the defendants as insufferable pests. Presumably their hope is to induce this Court to abrogate petitioners' free speech rights out of sheer irritation. This effort

is misguided.

First, the bulk of the evidence respondents marshal in order to disparage the defendants is irrelevant to this appeal. Petitioners do not contest the constitutionality of bans on "physically abusing, grabbing, touching, pushing, shoving, or crowding persons" or on "trespassing on, sitting in, blocking, impeding, or obstructing access." Pet. App. A-183 to A-184. While petitioners deny that respondents' allegations of such conduct are accurate, petitioners do not claim a *right* to engage in such behavior.

Second, even after twenty pages of effort, respondents still have not mustered a showing of "pervasive violence" that could justify the extraordinary restrictions at issue.[8] In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court held that even incidents of gunshots, slashed tires, beatings, and vandalism failed to justify restraints on expressive activity. *Id.* at 904-06, 916-17, 924 & n.67. In the case at bar, there were not even any sit-ins after the TRO issued.[9]

RESPONDENTS' MISCITATIONS

Respondents and their amici blatantly miscite a series of important decisions of this Court:

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8. Certain amici point to supposedly nationwide "violence" against abortion facilities. Brief of Feminist Majority Foundation *et al.* § IV. This self-serving hearsay goes far outside the record. Furthermore, FMF's outlandish definition of "violence" includes peaceful sit-ins, *id.* at 2a, constitutionally protected activity such as residential picketing, *id.*, and acts as trivial as litter, *id.* at 7a ("disposal of trash on clinic property" equated with "vandalism," which is deemed "the most highly reported type of violence").

9. Respondents refer to events occurring after the appeal from the preliminary injunction. *E.g.*, Resp. Br. at 48-49. This is improper. *See* Pet. App. A-17 n.3.

Respondents cite *Boos v. Barry*, 485 U.S. 312 (1988), as "upholding prohibition on three or more people congregating within 500 feet of foreign embassies," Resp. Br. at 36. *See also* Brief of American Medical Women's Ass'n, *et al.* ("AMWA Br.") at 20. In fact, *Boos* construed the ban in question only to apply to congregations which threaten the peace or security of an embassy, 485 U.S. at 330-31; "[t]herefore, peaceful congregations . . . are not prohibited," *id.* at 333.

Respondents cite *United States v. Grace*, 461 U.S. 171 (1983), as sustaining a ban on obstruction on sidewalks. Resp. Br. at 36 n.10. This is ludicrous. *Grace* struck down a ban on leafletting or the display of signs on the sidewalk surrounding the Supreme Court Building.

Respondents cite *Cox v. Louisiana*, 379 U.S. 559 (1965), as permitting "demonstrations near courthouse [to] be curtailed," Resp. Br. at 36. *See also* AMWA Br. at 20-21. But in light of *Grace*, *Cox* cannot stand for that proposition. In fact, *Cox* upheld only restrictions on picketing intended to interfere with the administration of justice or improperly influence judges, jurors, witnesses, or court officers, 379 U.S. at 560 – i.e., certain "illegal purpose" picketing.

Respondents cite *Beth Israel Hospital v. NRLB*, 437 U.S. 483 (1978), as "upholding . . . complete bans on union leafletting in areas where patients gather." Resp. Br. at 29. In fact *Beth Israel*, which was not even a First Amendment case, *overturned* a prohibition on leafletting and solicitation in the cafeteria and coffee shop of a private hospital.

Respondents cite *Rowan v. United States Post Office*, 397 U.S. 728 (1970), for the unqualified proposition that there is no right to press even a good idea on an unwilling recipient. Resp. Br. at 31. Respondents' amici go further, citing *Rowan* for the proposition that "it is constitutional to restrict speech based on notice communicated by a listener that further communication

is unwanted." AMWA Br. at 3. These descriptions overlook the obvious: *Rowan* upheld a statutory right of a *resident* to refuse unwanted mail. This Court explicitly distinguished the home from other settings. 397 U.S. at 738. *Rowan* does *not* support the constitutionality of restrictions on the countless messages pressed repeatedly – by everything from billboards to hawkers to picketers – upon those using public fora.

INAPPLICABILITY OF "RIGHT TO BE LET ALONE"

Respondents contend that, from their perspective, "the right to be let alone is central to this case." Resp. Br. at 22. Whereas the restrictions at issue apply to classic free speech activities, in the traditional public fora of streets and sidewalks, respondents' "right to be let alone" translates into a supposed "First Amendment right to reject unwanted speakers," Resp. Br. at 31, or as respondents' amici characterize it, "the ability to choose for ourselves what ideas and thoughts we want to be exposed to." AMWA Br. at 9 (quoting law review article). Of course petitioners, as private individuals, cannot violate rights applicable only against state action. Here, no government agency has posted sidewalk counselors or forced anyone to listen to them. In any event, recognition of a right "to choose what ideas and thoughts we want to be exposed to" is completely incompatible with a speakers' right "to choose the content of his own message," *Hurley*, 115 S. Ct. at 2347. While the auditor or viewer may certainly disagree with or disregard the speaker's message, that does not mean that the audience may gag the speaker.

NO CAPTIVE AUDIENCE

People using the public streets and sidewalks outside abortion businesses are not a captive audience. Pet. Br. § V(E). *See also* Brief of Family Research Council; Brief for the AFL-CIO at 26-28. Some of respondents' own amici readily concede as much. ACLU Br. at 16-17 & n.15 ("there are significant dangers to

applying the `captive audience' doctrine to a quintessential public forum"). Respondents nevertheless contend that the captive audience doctrine applies to people coming to and going from abortion facilities. Resp. Br. at 44-45. But *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), declared that the pregnant woman has a "right to make the ultimate decision, not a right to be insulated from all others in doing so," *Casey*, 505 U.S. at 877 (joint opinion). Respondents' reliance upon an isolated quotation out of context from *Madsen* is unavailing. As Judge Meskill explained below,

> *Madsen* . . . cannot be read as support for the use here of the "captive audience" doctrine. The *Madsen* Court simply recognized that women *in* the clinic were "held `captive' by medical circumstance," *Madsen*, 114 S. Ct. at 2526, thus supporting some of the injunction's restrictions, for example, those on banning loud noise levels or prohibiting the use of sound amplification equipment. This, however, does not mean that the women *approaching* the clinic are captive, and nothing in *Madsen* can be read as so holding.

Pet. App. A-64 n.5 (Meskill, J., dissenting) (emphasis in original). *Madsen* did not purport to revolutionize First Amendment jurisprudence by deeming pedestrians in the public forum a "captive audience."

IMPORTANCE OF CONSTITUTIONAL STANDARDS

Petitioners analyzed in detail the rigorous constitutional standards governing speech-restrictive injunctions after *Madsen*. Pet. Br. § III. Respondents reject this analysis, opting instead for an open-ended "flexible" constitutional standard. Resp. Br. at 28-29. But replacing firm constitutional requisites with pliable, formless analysis yields a flaccid and, ultimately, ineffective First Amendment. "Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those

moments when the daily politics cries loudest for limiting what may be said." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 64 U.S.L.W. 4706, 4719 (U.S. June 28, 1996) (SOUTER, J., concurring).

> Indeed, the creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence. Standards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day.

Id. at 4722 (KENNEDY, J., joined by GINSBURG, J., concurring in part, concurring in judgment in part, and dissenting in part). Doctrinal firmness is especially important to cases like this, where "[t]he underlying substantive issue . . . generates . . . a kind of `hydraulic pressure' that motivates ad hoc decisionmaking." *Leavitt v. Jane L.*, 64 U.S.L.W. 3834, 3836 (U.S. June 17, 1996) (STEVENS, J., joined by SOUTER, GINSBURG, and BREYER, JJ., dissenting).

Respondents suggest that *Madsen* should not be read as requiring initial resort to measures that do not restrict free speech. Resp. Br. at 28-29. But this requirement predates *Madsen* and reflects a fundamental tenet of First Amendment jurisprudence: speech cannot be restricted unless *necessary* to further a sufficiently strong countervailing interest. *Cf. United States v. O'Brien*, 391 U.S. 367, 377 (1968) (restrictions on expressive conduct may be "no greater than is essential"); *Ibanez v. Florida Dep't of Business and Professional Regulation*, 114 S. Ct. 2084-88 (1994) (restriction on commercial speech may be "no more extensive than necessary"); *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (time, place, and manner regulations in public fora may eliminate "no more than the exact source of the `evil'").

Madsen reiterated this First Amendment theme when it required that injunctions "burden no more speech than necessary," 114 S. Ct. at 2525. Restrictions on *speech* cannot be necessary if prohibitions on *misconduct* suffice. One cannot know whether a lesser, speech-protective measure could work if one resorts first to anti-speech measures. If recalcitrant lawbreakers defy injunctive restrictions on misconduct, the proper remedy is a contempt prosecution, not a broader injunction. *Cf.* Amicus Brief of Life Legal Defense Fndn. at 12-13.

When the problem is misconduct (as respondents assert) and not the speech itself, the first measure must target the misconduct. To do otherwise would indulge the bizarre and prejudiced assumption that the defendants will not comply with an injunction restricting their *conduct* but will comply with an injunction restricting their *speech*.

DIRECT RESTRAINTS ON SPEECH

Madsen did not overrule this Court's precedents subjecting speech-restrictive injunctions to prior restraint analysis. *E.g., Near v. Minnesota*, 283 U.S. 697 (1931); *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).[10] Rather, *Madsen* recognized a limited exception for content-neutral injunctions which restrict speech incidentally, in a limited manner, and in response to prior unlawful conduct. 114 S. Ct. at 2524 n.2. *See* Pet. Br. at 22-24.

The present injunction *directly targets speech, not conduct*. The 15-foot fixed buffer and floating bubble zones only bar "demonstrating." Pet. App. A-183. The "cease and desist"

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10. Respondents argue that because the present restrictions were imposed as a "*subsequent* response to lawlessness," prior restraint analysis does not apply. Resp. Br. at 24 (emphasis in original). This is simply incorrect. In both *Keefe* and *Near*, for example, the injunctions which this Court held to be prior restraints were imposed as subsequent responses to past alleged unlawfulness.

requirement applies only to "sidewalk counseling consisting of a conversation of a non-threatening nature." Pet. App. A-184. The order forbids neither physical presence as such, nor physical proximity as such. These injunctive restrictions truly impose "*speech*-free zones" and "*audience* vetoes" on speech.

The buffer zone in *Madsen*, by contrast, forbade mere "entering" in the zone, 114 S. Ct. at 2523,[11] regardless of any attempts to communicate. Thus, while the injunction was still unconstitutional in part, *id.* at 2528, this Court held that it was not a "prior restraint." The present injunction, which restricts only *expression*, cannot fit within the *Madsen* exception.

Furthermore, the challenged restrictions are not content-neutral. What was disturbing about the expressive activities of sidewalk counselors and picketers was *the content of their message*. As Marilynn Buckham, executive director of respondent Buffalo GYN Womenservices, frankly testified:

> And then I will say to the patient, what's the matter? And they'll say, these people outside, you know, are yelling and telling me things, and she'll start to cry. . . . And I've asked them what has been said to them and they said, well, they've told me that, you know, abortion is not a safe procedure, that I could die, that I may not be able to have children anymore. You know, they showed me these pictures of fetuses with, you know, ripping their arms and their legs off. And she said this was a difficult decision to me to make, and this makes it

11. The injunctive language forbidding "demonstrating" in this same zone in *Madsen* was wholly cumulative. Hence, contrary to respondents, Resp. Br. at 38 n.12, *Madsen* – which did not even address the term "demonstrating" – cannot be read to have approved the use of this term, much less to have rejected a vagueness challenge to the word. Tellingly, the district court here was itself unable to define the term "demonstrating". Dkt. 13, pp. 33-34 (Tr. of 9/27/90) (App. A to this reply brief).

> that much more difficult for me.
>
> And she said, I don't feel that I should have to go through this when I – it's no one's business – that's what – what I see is the anger, the resentment that they don't feel that they should have to go through this to get a medical procedure when it's been their own personal choice it should be no one else's business.

Tr. 489-90. *See also* Tr. 517-18. "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (and cases cited). As content-based restrictions, the challenged injunctive terms cannot fit within *Madsen*'s limited exception to the prior restraint doctrine. 114 S. Ct. at 2524 n.2.

NO HEALTH EXCEPTION TO FIRST AMENDMENT

Respondents highlight the supposedly adverse health consequences of free speech outside abortion facilities. Resp. Br. at 15-18. Some amici warn of "the potential physical and psychological harm *caused by [a sidewalk counselor's] communication.*" AMWA Br. at 24 (emphasis added). Amici American College of Obstetricians and Gynecologists *et al.* (ACOG Br.), supporting respondents, virtually argue for a "health exception" to the First Amendment. This Court must reject this line of reasoning.

The "health" argument proceeds as follows: Controversial and upsetting speech causes stress, sometimes severe stress. Stress is bad for health, especially for those undergoing medical procedures or suffering from medical conditions. Therefore, controversial speech can be restricted.

Plainly, acceptance of this argument would open a Pandora's Box of speech limitations. A protest-free world be "safer" in many ways. Pickets outside factories elevate stress for employees who cross the picket line and then, in an agitated condition,

handle heavy machinery at grave risk to life and limb. Strikes outside airport terminals impair the mental concentration of air traffic controllers and pilots, with potentially devasting consequences. Colorful or graphic images on placards distract passing drivers, causing accidents. Large assemblies risk riots or trampling, especially when the topic is a matter of passionate debate.

Furthermore, health concerns do not apply only to site-based protests. The offensive cartoon at issue in *Falwell v. Flynt*, 797 F.2d 1270, 1276-77 (4th Cir. 1986), *rev'd sub nom. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), caused Rev. Falwell to suffer severe emotional distress. The publication of the rape victim's name in *The Florida Star v. B.J.F.*, 491 U.S. 524, 528 (1989), likewise caused her to suffer significant emotional distress. Vitriolic editorials may aggravate heart conditions and nervous disorders in the targets of their caustic criticisms. The outspoken denunciation of human abortion at press conferences and at pro-life conventions surely upsets unsympathetic viewers of news coverage of these events, including some persons scheduled for imminent abortions.

Do these considerations mean that speech that disturbs others to the extent of jeopardizing health thereby loses constitutional protection? Certainly not. *See* Pet. Br. at 21. The framers of the First Amendment saw their share of rhetorical barrages, intimidating treatment of effigies, and "harassing" protests. They presumably knew that such demonstrations seriously disturbed the appetites, sleep, and vital signs of many Loyalists and British agents, perhaps causing some to suffer even severe medical consequences. But the framers nonetheless rejected the "health" of the straitjacket and the censor, in favor of the "hazardous freedom" of the First Amendment, *see Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 508 (1969).

Respondents make passing reference to an alleged health risk of delaying abortion in response to protest activities. Resp. Br. at 16. It is certainly true that abortion, as the forcible interruption of the natural state of pregnancy, poses dangers to the woman, as even respondents' amici admit, ACOG Br. at 7 & nn.6-7. But respondent Paul Davis, MD, testified that, at least through fourteen weeks of gestation, "I'm not dealing in the area where a delay would make any difference." Tr. 847-48. Furthermore, respondents themselves have no qualms about delaying their patients' abortions, not only to accommodate their own business schedule (abortions are not done every day of the week), but also whenever *they* conclude the pregnant woman should wait and reconsider:

> Q. Have you ever . . . witnessed a woman who seemed to be less certain of the abortion decision than the parent or partner who was with her? A. Yes. . . . And if I feel in any way as the counsellor speaking to that person that day that she is being strong-armed, I ask them to go home, think about it. *They can always reschedule, they can always come back, but that is not the day for them to have the abortion if I feel – if there's some way that I feel that she does not want this abortion, she's not going to have it.*

Tr. 696-97 (M. Buckham, Exec. Dir. of Buffalo GYN Womenservices) (emphasis added).[12]

PROPER RELIEF

Respondents concede that the present injunction "has become legally and factually stale," Resp. Br. at 48, and "outmoded," *id.* at 49. As petitioners pointed out, the district court has dismissed

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12. Respondents point to two-day abortion procedures in which laminaria is used to dilate the cervix prior to the abortion. Resp. Br. at 16. But a woman can still change her mind, have the laminaria removed, and continue the pregnancy. Tr. 624 (Buckham).

the legal basis for precisely the speech-restrictive provisions at issue. Pet. Br. § IV.[13] This Court should therefore reverse the challenged provisions for lack of supporting interests. *See id.*

Respondents disagree, arguing that the Court should instead dismiss the writ of certiorari as improvidently granted. This would be improper and unwise. First, the injunctive restrictions place ongoing limits on free speech and therefore cause irreparable harm. *E.g. Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality). Second, dismissing the writ would leave the Second Circuit's extreme *in banc* opinions in place, prejudicing future First Amendment litigation in this case and in other cases within that circuit. Third, respondents bear the burden of justifying these unprecedented restrictions on speech. If they cannot do so because their legal claims have evaporated and their facts have become "stale," then the injunction must fall.[14]

CONCLUSION

The judgment below should be reversed.

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13. The absence of a supporting cause of action represents a fatal *constitutional* defect. Pet. Br. § IV. The issue is therefore fairly included in the questions presented here.

14. Respondents also cite *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), where this Court declined to vacate an injunction and instead remanded for a determination whether pendent state claims could support the relief granted. *Bray* reaffirmed the rule that an injunction must rest upon supporting claims. However, in *Bray* this Court did not have before it a First Amendment challenge to the injunctive restrictions. Therefore, simply remanding the matter, while leaving the injunction temporarily in place, theoretically did not burden any free speech rights.

Respectfully submitted,

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APPENDIX

APPENDIX A: Excerpt of Transcript of
Sept. 27, 1990 (dkt. 13)

[33] MR. SAUNDERS: I believe Mr. Schenck has one comment.

REV. SCHENCK: I have two, with your Honor's indulgence.

The first is in regard to page two, item 1(a) trespassing on, sitting in, blocking, impeding, or obstructing access, ingress or egress is understandable. Including demonstrating – and I'm not certain that there is a firm and fast definition of the word "demonstrating" and what that implies, and I imagine that that was probably discussed at length yesterday.

THE COURT: Well, the question came up and I addressed it by saying that the normal, ordinary meaning of that word will apply.

And the discussion went along the line as, well, what is – what does that mean? And it was, I think pretty much clearly said that the individuals themselves [34] know what their activities are: The carrying the signs or whatever. I think that's the way that discussion went.

And the only thing I can tell you on that is that it's – will apply the ordinary meaning of that word. And there's not much more I can tell you other than that. I think we'll have to wait and see what the facts are, if they develop that there's an alleged violation of this order.

REV. SCHENCK: Furthermore, my concern is that

if, for instance, using myself as an example, if I am holding a sign, and an individual who is so described, seeking access to or leaving such facilities, approaches me -- now, this is not necessarily an individual who they have referred to as a "client" or a "woman" or a "mother" or whomever, but just anyone seeking to go in or out – if that individual then dogs me and shadows me, it becomes then my responsibility, as I read this, to move to the back of the bus, so to speak.

In other words, the [35] possibility here of entrapment is very high and very probable. The fact that someone could move purposely in my direction, if I'm expressing my free speech rights of demonstration, and that individual continuously presses in beyond the 15 foot rule, since they are not implicated in this language, then it comes to me or falls upon me to avoid the 15 foot rule.

And in my imagination, what I imagine is either being run away from a piece of property virtually by proximity to an individual who was coming out, let's say of a facility, and closing in on me, as a demonstrator –

THE COURT: You say the foot 15 rule would move as the individual coming out or going in?

REV. SCHENCK: Yes, I understand this to mean that to come within 15 feet of any person seeking access or leaving such facility. So in my opinion, if you're walking three blocks, if they are leaving the facility, then if I can't come within 15 feet of that person, that could be a moving [36] designation, a moving figure.

THE COURT: I don't think that was the intent of

this is to have it moving. I think what we're talking about is that we want to make sure that there is free access. The reason why we came up with the 15 feet was because we were concerned about automobiles, that there be enough room for an automobile to pass freely. It's not a moving 15 feet.

REV. SCHENCK: So in other words, you're speaking of the facility itself?

THE COURT: I think that's what we were talking about yesterday but – there's a doorway, I guess. Let's say that's the doorway right there. We're talking 15 feet from there to go right out to wherever you're going. That person comes to you, my gosh, you would never be able to ever realistically know how to deal with that, if it was a moving length.

It's 15 feet from the entrance. I think you have to apply common sense to this too, and that would not in any way at all be a fair interpretation of what [37] we're talking about.

REV. SCHENCK: Well, I'm glad that you pointed that out, but there is, I think, a very high degree of ambiguity, because even in our discussions here casually, that's not the way we were referring to it, and no one came back to that and said what we're talking about here is 15 feet from an entranceway.

THE COURT: I think everyone is clear on that now.

MS. FINLEY: Yes, I think the intent is quite clear, your Honor, that the – it's in the context of a paragraph that is designed to preserve unimpeded access to a facility.

APPENDIX B: Excerpt of Transcript of
March 26, 1991 (dkt. 88a)
(testimony of Karen Swallow Prior)

[1284] Q. Mrs. Prior, is it your testimony that you have encountered women arriving for scheduled appointments at abortion clinics with boyfriends or male companions?

A. Yes.

Q. And is it your testimony that on some of those occasions it appeared to you that the woman was willing to talk to you, but the man was attempting to prevent you from talking to her?

A. Yes.

Q. Can you give us more specifically what you've seen that leads you to that [1285] conclusion that sometimes a woman is willing to talk to you, but a male companion with her tries to prevent her and you from doing so?

A. Okay. I've seen that in a number of ways. One of the ways is through the body language of the couple. The man attempting to steer and push the woman toward the door, and keep her – keep himself between her and the counsellors.

Another way would be the man accompanying her yelling at us, telling us no, we don't want your information or leave us alone or anything else, while the girl herself, or the woman herself would not be saying anything, or might be looking at us or might be crying and looking very upset. In that case, it's almost impossible for me to determine exactly what the

girl or the woman would want, because the person accompanying her is speaking for her. So it can be in a variety of ways that I perceive pressure.

Q. Have you – in such – on such occasions, have you encountered men who tried to [1286] prevent you from speaking to the woman even though it appeared to you that the woman was willing to speak with you?

A. Yes.

Q. Have you ever had any specific incidents in which one individual in a group told you that they didn't want to talk to you, but before they got into the clinic it turned out that someone else in the group was willing to talk?

A. Yes.

Q. Have you ever seen occasions where a patient that you first encounter continues to walk toward the clinic without stopping, even after you first approached them, and yet at some point before they get to the clinic they do stop and speak to you?

A. Yes.

Q. And under such circumstances have you seen patients who continued walking at first, but before they arrived at the clinic, they stopped and they were willing to take your literature and ask you questions?

A. Yes.

Q. Has that happened on a fairly regular basis?

[1287] A. I wouldn't say a regular basis, no. I'd say occasional.

Q. But you have seen that happen?

A. Yes.

Q. Have you had occasion to witness sidewalk counsellors attempting to counsel patients on days and occasions when no Pro-Choice escorts were present?

A. Yes.

Q. And in your opinion, can you contrast the difference between the two situations?

A. Those two situations are entirely different. When no escorts are present, I can come up to the woman and talk to her in a normal conversational tone and she can respond to me and we can have what I call civilized conversation, and I can explain to her the information that I have. She can tell me either that she does want it or doesn't want it. I'm able to tell immediately how receptive she is to the [1288] information, whether or not it's a good idea to continue counselling with her.

While on the other hand, if escorts are there, it's almost impossible to determine the woman's receptivity to the information because there's usually an escort standing physically between us or and/or shouting, and it's very difficult to make any kind of conversational or eye contact with the woman to determine exactly whether or not she wants to talk to me.

THE COURT: What period of time are you talking about, ma'am?

THE WITNESS: From my experiences from August 1989 through 1990. I've counselled in every –

THE COURT: Through 1990?

THE WITNESS: Right. Well, as I explained before – well, I have been counselling on an occasional basis this semester. So it would include that. But it's only been –

THE COURT: When was the last time you tried to counsel a patient that was going into one of these clinics that you had [1289] this type of an experience?

THE WITNESS: With the escort or without?

THE COURT: With the escort.

THE WITNESS: Not – this past Saturday the one before that.

THE COURT: And what happened then?

THE WITNESS: That was at 1241 Main Street, and on at least one occasion, probably a couple more, a car pulled into the driveway, which was across from the clinic, it was the driveway of the Buffalo Biblical Library, and I attempted to walk over to the car, and it was – the woman had her window down, and my partner handed her the literature, and then her husband, who was driving the car, sped up the car, because at the same time escorts were coming over and directing them to go down the driveway, and the woman was just like looking at us, and she was very upset, and she – I just know she wanted to talk to us. And I know she wanted the information because her window was

down and she was [1290] reaching for it.